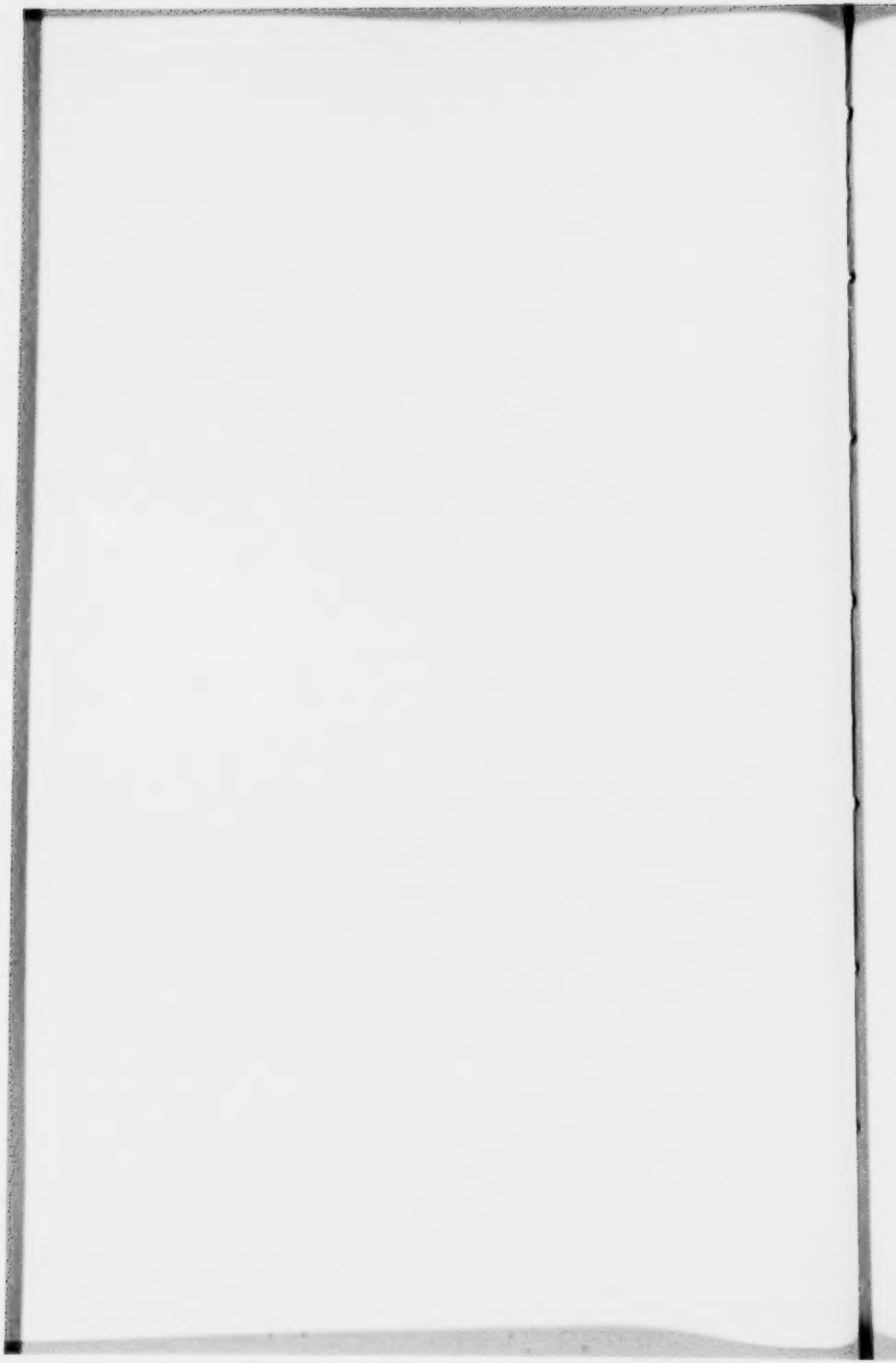

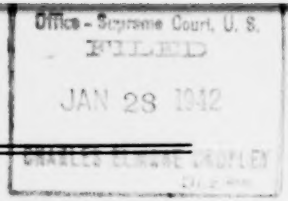

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 833.

J. E. STEVENS AND McKAY STEVENS, PETITIONERS,

VS.

SINCLAIR REFINING COMPANY, A CORPORATION, RESPONDENT.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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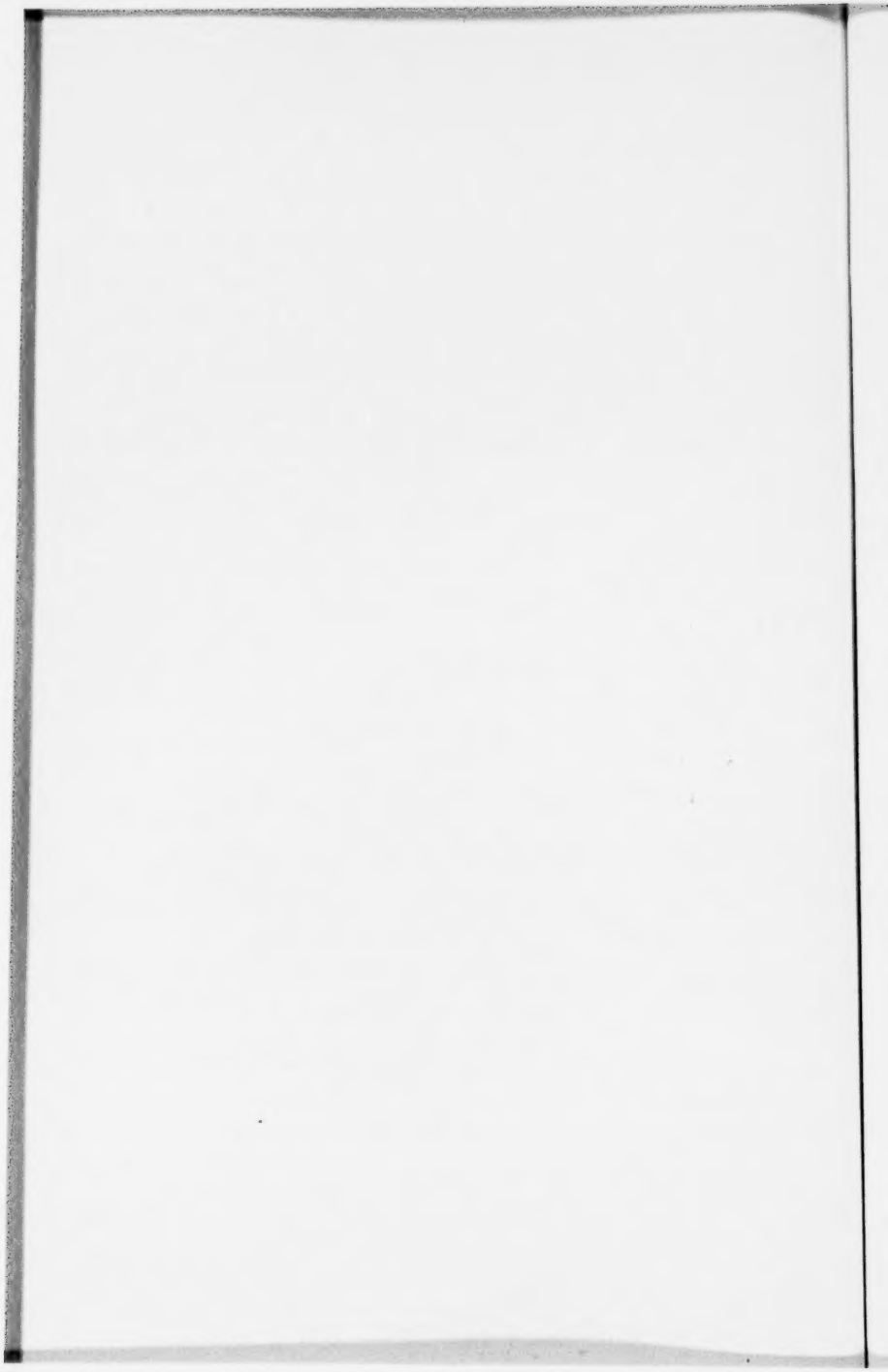

INDEX

Opinions Below 1
Statement 2
Summary of the Argument 3

Argument—

I. The appeal involves only the state law and the circuit court of appeals has properly applied the state law in conformity with 28 U. S. C. A., Sec. 725 4

II. There is no more uniformly accepted rule of pleading in Missouri than the rule that where a general allegation in a petition is followed by a plea of particular acts of negligence, such particular acts of negligence supersede the general allegations. The circuit court of appeals so applied this rule 4

III. Rule 16 is not involved in the record 6

IV. The petition does not, as required under Rule 38 (2), contain a summary and short statement of the matter involved but, on the contrary, is argumentative 7

V. The petition is based on matters not in record on appeal 8

VI. This decision does not conflict with a decision of any other circuit court of appeals on the same matter 8

Conclusion 9

TABLE OF CASES

Erie Railroad vs. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 4
Hudson vs. Moonier, 304 U. S. 397, 58 S. Ct. 954, 82 L. Ed. 1422 4
Rosenthal vs. New York Life Ins. Co., 304 U. S. 263, 58 S. Ct. 874, 82 L. Ed. 1330 4
Ruhlin vs. New York Life Ins. Co., 304 U. S. 202, 58 S. Ct. 860, 82 L. Ed. 1290 ..... 4, 8
Stoner vs. New York Life Ins. Co., 311 U. S. 464, 61 S. Ct. 336, 85 L. Ed. 284 4
Vandenbark vs. Owens-Illinois Glass Co., 311 U. S. 538, 61 S. Ct. 347, 85 L. Ed. 327 4
West vs. American Tel. & Tel. Co., 311 U. S. 223, 61 S. Ct. 179, 85 L. Ed. 139 4

STATUTES

28 U. S. C. A., Sec. 725 ..... 3, 4

TEXTBOOKS

Rules of Civil Procedure, Subsection (a) of Rule 75 8

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OPINIONS BELOW.

The opinion of the Circuit Court of Appeals for the Eighth Circuit is reported in 123 F. 2d 186 (Rehearing denied November 26th, 1941). The Court applied the law of Missouri where the tort action arose and in so applying the State law the opinion shows clearly that there could be no conflict with the decision of another Circuit Court of Appeals on State law.

The opinion of the District Court is found at Pages 55 and 56 of the record, being the order dated June 26th, 1940, overruling motion of defendant for judgment on the pleadings.

STATEMENT.

The appeal is on the pleadings alone which are fully set out in the record and in the opinion of the Circuit Court of Appeals. Respondent contended in the trial Court that it was entitled to a judgment on the pleadings. Shortly after the pleadings were made up that motion was denied. The case came on for trial in November, 1940 (R. 55 and 56). Following the trial, respondent moved for a directed verdict, at the conclusion of the evidence on the same ground. Respondent also moved on the same ground for judgment notwithstanding the verdict. Both motions were denied.

The District Judge held the contracts pleaded by respondent, as a bar to the action, to be invalid in Missouri (R. 55-56).

The action is in tort and, based on alleged negligence, the Circuit Court of Appeals has properly applied the State law as announced by the Courts of Missouri.

Rule 16 of the Federal Rules of Civil Procedure is not involved in the record. In "*Order Overruling Motion of Defendant for Judgment on Pleadings*" (R. 55 and 56) the District Court in the first paragraph of that order makes this statement:

> "This cause is pending upon motion for judgment on the pleadings. The parties have collaborated in so framing the (pendings) that the issue of law involved is clearly presented. Such action is to be commended."

No order was made at the pre-trial conference as is disclosed by the record. If petitioners acquired rights under a pre-trial conference, they would appear in the record by proper order. After the issue of law was clearly presented by the pleadings, the District Court erroneously overruled the motion for judgment and in so doing erroneously applied the law (R. 55 and 56). The Circuit

Court of Appeals, in holding the releases against negligence to be valid, reversed the opinion of the District Court, and held that the releases pleaded were a complete bar to the action pleaded by petitioners.

The petition violates Rule 38 (2) of the Supreme Court Rules, which requires it to contain only a summary and a short statement of the matter involved. The matters set forth on Page 8 of the petition are argumentative. The petition on Page 8 fails to point as reference to any page of the printed record to support the statements (Page 8 of Petition).

The Rules of Decision of the Missouri courts have been followed by the Circuit Court of Appeals in conformity with 28 U. S. C. A., Sec. 725, and the petition should be denied for there are no conflicts or any special or important reasons for granting the Writ.

SUMMARY OF THE ARGUMENT.

(1) The appeal involves only the State law and the Circuit Court of Appeals has properly applied the State law in conformity with 28 U. S. C. A., Sec. 725.

(2) There is no more uniformly accepted rule of pleading in Missouri than the rule that where a general allegation in a petition is followed by a plea of particular acts of negligence, such particular acts of negligence supersede the general allegations. The Circuit Court of Appeals so applied this rule.

(3) Rule 16 is not involved in the record.

(4) The petition does not, as required under Rule 38 (2), contain a summary and short statement of the matter involved but, on the contrary, is argumentative.

(5) The petition is based on matters not in record on appeal.

(6) This decision does not conflict with a decision of any other Circuit Court of Appeals on the same matter.

ARGUMENT.

I.

The Appeal Involves Only the State Law and the Circuit Court of Appeals Has Properly Applied the State Law in Conformity with 28 U. S. C. A., Sec. 725.

Since *Erie Railroad* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, the Rules of Decision require the questions involved in this appeal, being purely local in nature, a common law tort action, arising from alleged acts of negligence, to be decided according to the decisions of the State Court.

Ruhlin v. *New York Life Ins. Co.*, 304 U. S. 202, 58 S. Ct. 860, 82 L. Ed. 1290.

West v. *American Tel. & Tel. Co.*, 311 U. S. 223, 61 S. Ct. 179, 85 L. Ed. 139.

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Vandenbark v. *Owens-Illinois Glass Co.*, 311 U. S. 538, 61 S. Ct. 347, 85 L. Ed. 327.

II.

There Is No More Uniformly Accepted Rule of Pleading in Missouri Than the Rule That Where a General Allegation in a Petition Is Followed by a Plea of Particular Acts of Negligence, Such Particular Acts of Negligence Supersede the General Allegations. The Circuit Court of Appeals So Applied This Rule.

In the opinion of the Circuit Court of Appeals, 123 F. 2d 186, 190, the Court in discussing the pleadings states in part as follows:

"In response to these contentions of the plaintiffs, the defendant presents:

(1) * * *.

(2) That the amended petition does not plead that plaintiffs suffered damage as the proximate result of any negligence of defendant in making repairs, and,

(3) * * *."

The Court further, at Page 190, in discussing the question last quoted, states as follows:

"2. As to the claim that defendant became liable for negligence in making repairs after the installation of the equipment.

Examination of the amended petition discloses that after reciting the course of the transaction between the parties the allegations which follow are that the damages sustained by plaintiffs were the proximate result of five specific acts of negligence on the part of defendant. These specific acts are set out above and no one of them is an act of negligence on the part of defendant in making repairs. These specific charges follow the general statement:

'8. That wholly disregarding its duty to exercise due care in the installing, repairing and altering of said equipment, said defendant carelessly and negligently installed, repaired and altered said equipment as hereinabove pleaded, and that such negligence was, in part, as follows, to-wit:'

Then follow the specific charges.

(5) The pleading falls within the rule stated by the St. Louis Court of Appeals in *Munsey* v. *Eagle Packet Co.*, 50 S. W. 2d 754-756, 757, as follows:

'It is a trite doctrine that, where a general charge of negligence is followed by a specific charge, the specific charge supersedes the general, and that, if a plaintiff under such circumstances recovers at all, it must be upon the specific act or acts of negligence and not upon the general. *Zasemowich* v. *Amer. Mfg. Co.*, (Mo. Sup.) 213 S. W. 799, 802; *Pointer* v. [*Mountain*] *Ry. Const. Co.*, 269 Mo. [104], 109, 189 S. W. 805, L. R. A. 1917 B, 1091; *McGrath* v. *Transit Co.*, 197 Mo. 97, 94 S. W. 872; *Papamichael* v. *Wells*, (Mo. App.) 33 S. W. 2d 1058; *Boeckmann* v. *Milling Co.*, (Mo. App.) 199 S. W. 457; *Feary* v. *Met. St. Ry. Co.*, 162 Mo. 75, 62 S. W. 452; *McManamee* v. *Ry. Co.*, 135 Mo. 440, 37 S. W. 119; *Waldhier* v. *Ry. Co.*, 71 Mo. 514; *Pate* v. *Dunbauld*, 298 Mo. 435, 250 S. W. 49.'

(6) It follows that plaintiffs could not recover on the ground that defendant had been guilty of negligence in repairing the equipment. *Farm & Home Sav. & L. Ass'n* v. *Armstrong*, 337 Mo. 349, 85 S. W. 2d 461."

III.

Rule 16 Is Not Involved in the Record.

The record shows no order was issued under Rule 16 as contemplated in the Rule. The Order Overruling Motion for Judgment on Pleadings was filed in the District Court June 26th, 1940 (R. 55). The case came on for trial November 2nd, 1940 (R. 56). Rule 16 is a discretionary rule, as is stated in the body of the rule and could have no uniform application for none was intended. The Rule is for the convenience of the litigants and the Court and no interpretation of the Rule would permit the abridgment, enlargement or modification of any of the substantive rights of any litigant. Various documents

were pleaded and the reference to the parties collaborating must, of necessity, have related to the parties admitting by pleadings the execution of the releases (R. 54). Collaboration on the pleadings could have no other meaning.

In the Order Overruling Motion of Defendant for Judgment on Pleadings it is stated in that Order that the parties collaborated in framing the pleadings. After so framing the pleadings, the District Court erroneously applied the law, holding the releases invalid, and overruled the motion for judgment and this is the Order the Circuit Court of Appeals reverses and remands the case with direction to enter judgment on the pleadings for respondent and in the opinion of the Circuit Court of Appeals, *supra,* at Page 192 the Court concludes:

> "As the pleadings disclosed on their face that the plaintiffs had released the defendant and indemnified it against the losses sued for, the motion of defendant for judgment on the pleadings should have been and is now sustained."

IV.

The Petition Does Not, As Required under Rule 38 (2) Contain a Summary and Short Statement of the Matter Involved but, on the Contrary, Is Argumentative.

It is provided in Rule 38 (2) that the petition shall contain a summary and a short statement of the matter involved, but on the contrary, the petition at Page 8 contains matters of argument. By referring to Page 8 of the petition it will be found that petitioners do not cite the appropriate page numbers of the record to support the statements objected to as argumentative, being the second, third and fourth paragraphs on that page of the petition.

V.

The Petition Is Based on Matters Not in Record on Appeal.

It is provided in Subsection (a) of Rule 75 of the Rules of Civil Procedure for the District Courts of the United States:

> "Rule 75. Record on Appeal to a Circuit Court of Appeals.
>
> "(a) Designation of Contents of Record on Appeal. Promptly after an appeal to a circuit court of appeals is taken, the appellant shall serve upon the appellee and file with the district court a designation of the portions of the record, proceedings, and evidence to be contained in the record on appeal. Within 10 days thereafter any other party to the appeal may serve and file a designation of additional portions of the record, proceedings, and evidence to be included."

The record, on pages 64 to 70, shows that part of the record designated by respondent to be contained in the record on appeal. Petitioners did not file a designation of additional portions of the record, proceedings and evidence to be included in the appeal, and cannot now complain of the failure of the record on appeal to contain the record of the testimony (Pages 9 and 10 of petition, under paragraph No. 2 of Questions Presented).

VI.

This Decision Does Not Conflict with a Decision of Any Other Circuit Court of Appeals on the Same Matter.

The matter presented is controlled entirely by State Law and any conflict amongst the Circuits is not of itself a reason for granting a Writ and the petition should be denied. *Ruhlin* v. *New York Life Ins. Co.*, 304 U. S. 202, 58 S. Ct. 860, 82 L. Ed. 1290.

Conclusion.

Since the Circuit Court of Appeals correctly applied the Missouri Rules of Decision as interpreted by the appellate courts of Missouri, the petition for Writ of Certiorari should be denied.

Respectfully submitted,

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